89-839

NO. 89-_____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1989

STATE OF ARIZONA,

Petitioner,

-vs-

ORESTE C. FULMINANTE,

Respondent,

ON WRIT OF CERTIORARI TO THE
ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Arizona Supreme Court err in failing to apply the totality of circumstances test in addressing the question whether Fulminante's confession to an inmate informant was made voluntarily, and did the court err in holding that admission in evidence of Fulminante's confession violated his right to due process under the Fifth and Fourteenth Amendments of the United States Constitution on the ground that the confession was coerced by the inmate informant's implied promise to protect Fulminante from other inmates who were subjecting him to rough treatment, where Fulminante never expressed any fear of the other inmates and never sought the inmate informant's protection?

2. Can the erroneous admission of an involuntary confession be subject to a harmless error analysis in a case where there is overwhelming evidence of guilt, including a second voluntary confession, and where there has been no especially egregious conduct by law enforcement officials?

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Authorities

OPINIONS BELOW

The Arizona Supreme Court's 1988 opinion holding that Fulminante's confession to an inmate informant was involuntary, but that its admission was harmless error beyond a reasonable doubt, is reported at ___ Ariz. ____, ____ P.2d ___ (1988). The opinion is appended here as Exhibit A and the order granting Fulminante's motion for reconsideration is appended as Exhibit B.

The Arizona Supreme Court's 1989 supplemental opinion holding that federal constitutional law precluded it from finding Fulminante's involuntary confession to an inmate informant to be harmless error is reported at ___ Ariz. ___, ___ P.2d ___ (1989). The supplemental opinion is appended here as Exhibit C and the order denying the state's motion for reconsideration is appended as Exhibit D.

STATEMENT OF JURISDICTION

The opinions of the Arizona Supreme Court which the state asks this Court to review were entered on June 16, 1988, and July 11, 1989. The Arizona Supreme Court denied the state's motion for reconsideration on September 19, 1989. This petition is filed within 60 days from that denial, on or before November 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

In the early morning hours of September 16, 1982, Richard Lence was walking his dog in the desert area outside Mesa when he discovered the mutilated, partially decomposed body of a young girl. The girl's jeans were unzipped, and had been pulled down over her buttocks. A cloth ligature or garment rag was tied around her neck.

An autopsy of the girl's body revealed that she died after being shot twice in the head at close range by a large caliber weapon, such as a .357 revolver. Although the ligature around the girl's neck did not contribute to her death, it could have been used to effect non-fatal choking prior to her death.

The body was identified as that of Jeneane Hunt, Fulminante's 11-year-old stepdaughter. Fulminante had been taking care of Jeneane from September 7-14,

while his wife Mary was in the hospital for surgery. Fulminante had telephoned the Mesa Police Department at 1:49 a.m. on September 14 to report that Jeneane was missing. When Mary returned from the hospital on September 14, she found that Fulminante's .357 Dan Wesson revolver was missing from their bedroom.

Mary told the police that Fulminante and Jeneane did not get along with each other, and that there was a lot of fighting in the Fulminante home. On one occasion, Fulminante spanked Jeneane so hard with a "spanking board" that he bruised her buttocks. The police investigated the incident and questioned Fulminante about it. Fulminante later told Mary that he would "get even" with Jeneane, and threatened to "kill her fucking ass."

During their investigation, the police found out that Fulminante traded a rifle

for an extra barrel for his .357 Dan Wesson revolver the day before Jeneane's disappearance. Fulminante's actions in purchasing the interchangeable barrel for his revolver and his numerous inconsistent statements to the police regarding Jeneane's disappearance resulted in Fulminante becoming a suspect in Jeneane's murder.

In 1983, Fulminante was serving time in Raybrook Federal Correctional Institution in New York for possession of a firearm by a felon. While at Raybrook, Fulminante became friendly with another inmate, Anthony Sarivola. Although Sarivola masqueraded in prison as an organized crime figure, he was actually an informant for the F.B.I. in matters relating to organized crime in the Brooklyn, New York City area. Sarivola heard a rumor while in prison that Fulminante had killed a child in

Arizona. Sarivola reported the rumor to his F.B.I. contact, who then told Sarivola to find out more about the rumor. Fulminante had been receiving rough treatment from the other inmates, so Sarivola told Fulminante that he had to tell him the truth in order for Sarivola to give him any help. Fulminante then admitted to Sarivola that he had taken his stepdaughter, Jeneane, out to the desert on his motorcycle, and that he then shot her two times in the head with his .357 revolver. Fulminante said he did it because Jeneane was a little bitch who was always in his way with his wife. Fulminante told Sarivola that he choked Jeneane and made her beg a little before shooting her. He also said that he forced Jeneane to perform oral sex on him.

When Fulminante was released from prison in May of 1984, Sarivola and his

fiancee, Donna, picked Fulminante up at the bus terminal. Donna asked Fulminante if he had any relatives he wanted to go see after getting out of prison. Fulminante told Donna that he could not go back to Arizona because he had killed a little girl there. Fulminante boasted that one day he was going to make it his business to go back to Arizona so that he could "piss on her grave." Fulminante told Donna that he had taken the little girl out into the desert where he raped, beat, and choked her before shooting her in the head. Fulminante also said he made the little girl beg before he shot her. Fulminante referred to the victim as "the fucking little kid that had got in the way of him and his wife."

Fulminante's confession to Sarivola was admitted in evidence over his objection that it was involuntary, and his confession to Donna was admitted in

evidence over his objection that it was the "fruit" of Sarivola's violation of his constitutional rights approximately 6 months earlier.

Fulminante was convicted of first-degree murder. The court found as an aggravating factor that the murder was especially heinous, cruel and depraved. The court found there were no mitigating circumstances, and imposed the death penalty.

Initially, the Arizona Supreme Court affirmed Fulminante's conviction. The court agreed with Fulminante that his confession to Sarivola should have been suppressed because it was rendered involuntary by Sarivola's promise to protect Fulminante from other inmates. But, the court held that the admission of the confession was harmless beyond a reasonable doubt because it was cumulative to his second confession to

Donna, which "established his guilt." The court found that the physical evidence in the case corroborated the confession to Donna. The court specifically rejected Fulminante's claim that his confession to Donna should have been suppressed based upon the "fruit of the poisonous tree" doctrine.

Fulminante filed a timely motion for reconsideration, which the court granted. The court then issued a supplemental opinion reversing Fulminante's conviction. The court reversed its previous determination that admission of Fulminante's coerced confession to Sarivola was harmless error, and held that federal constitutional law "compels us to conclude that the receipt of the original coerced confession may not be considered harmless error."

Justice Cameron dissented from the majority opinion on the ground that "changes in the law now allow the harmless error doctrine to be applied to coerced but reliable confessions."

Following denial of a timely motion for reconsideration, the state petitioned for the instant writ of certiorari to the United States Supreme Court.

REASONS FOR GRANTING THE WRIT

The Arizona Supreme Court erred as a matter of federal constitutional law in failing to apply the totality of circumstances test in addressing Fulminante's claim that his confession was not voluntary.

Even assuming, arguendo, that the court properly found that Fulminante's confession should not have been admitted in evidence, the court erred in determining that it was precluded by this Court's prior opinions from applying a

harmless error analysis to admission of the confession. A discussion of each issue follows.

Prior to trial, Fulminante moved to suppress his confession to Sarivola on the ground that it was involuntary. Neither party presented any evidence at the suppression hearing. Instead, Fulminante adopted the following recitation of facts set forth by the state in its response to the motion to suppress:

> It is a fact that Anthony Sarivola was at all times pertinent to this case a paid confidential informant for the F.B.I. He was an informant in matters that related to organized crime in the Brooklyn, New York City area. It is also true that while incarcerated in Raybrook Prison in upstate New York various rumors reached Mr. Sarivola that Oreste Fulminante had killed his step-daughter in Arizona.
>
> Initially these were rumors and initially the truth of the rumors was denied by the defendant. It is also true that Mr. Sarivola passed the rumors on to the F.B.I. Upon being informed of those rumors, the

> F.B.I. agent, Mr. Walter Ticano, supposedly said ". . . that's just a rumor, you'll have to find out more about it . . ." before I can act upon it, or words to that effect. The witness, Anthony Sarivola, went back to the defendant and asked him if these rumors were in fact true adding that he, Mr. Sarivola, might be in a position to help protect the defendant from physical recriminations in prison, but that the defendant must tell him the truth. Thereupon the defendant told Mr. Sarivola that he, in fact, had killed his step-daughter in Arizona, and gave him substantial details about how he killed the child. At no time did the defendant indicate he was in fear of other inmates nor did he ever seek Mr. Sarivola's "protection."

(Response to Motion to Suppress, filed October 30, 1985.)

Based upon the preceding stipulated facts and argument of counsel, the trial court stated that:

> The Court does not find that the statements allegedly made in this case were the result of promises, threats or coercion by the Government or any of its agents.

In its initial opinion, the Arizona Supreme Court held that the trial court

did not abuse its discretion in finding that the confession was voluntarily made, noting that " . . . defendant provided the trial court with little or no evidence tending to support defendant's claim that he was in danger and that Sarivola used this fact to coerce a confession." Despite this fact, the court then determined that the confession should have been suppressed because it found, from a review of Sarivola's trial testimony, that "In response to Sarivola's offer of protection, the defendant confessed."

Petitioner contends that the Arizona Supreme Court erroneously relied on Malloy v. Hogan, 378 U.S. 1 (1964) and Bram v. United States, 168 U.S. 532 (1897), in applying a "but-for" test to Fulminante's confession. This Court has held that the lower court must consider what effect the totality of the

circumstances had upon the will of the accused, and must determine if the accused's will was overborne when he made the statements. Schneckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973). Factors to be considered include:

> [T]he youth of the accused; his lack of education or his low intelligence, the lack of any advice to the accused of his constitutional rights; the length of detention; the repeated and prolonged nature of questioning; and the use of physical punishment such as the deprivation of food or sleep.

412 U.S. at 226.

It is true that in Bram v. United States, 168 U.S. 532 (1897), this Court accepted the view that, to be voluntary, statements must not have been "extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight." Id. at 542-43. The Bram test has not been interpreted as a per se proscription

against the admissibility of a defendant's statements merely because of promises made during interrogation. Green v. Scully, 850 F.2d 894 (2d Cir.), cert. denied, 109 S. Ct. 374 (1988); Miller v. Fenton, 796 F.2d 598, 608 (3rd Cir.), cert. denied, Miller v. Neubert, 479 U.S. 989 (1986). Despite the seemingly plain language of the Bram rule, this Court has not used a "but-for" test when promises have been made during an interrogation; rather the Court has indicated that it does not matter that the accused confessed because of the promise, so long as the promise did not overbear his will. Hutto v. Ross, 429 U.S. 28, 30 (1976) (per curiam). The ultimate question is whether the contested statements or promises were so manipulative or coercive that they deprived an accused of his ability to make an unconstrained, autonomous

decision to make the subsequent statements. See Miller v. Fenton, 796 F.2d at 608. The Arizona Supreme Court's purported reason for overruling the trial court's determination of voluntariness was because of the following testimony Sarivola gave at trial:

> And we used to go walking around, and he was getting a - starting to get some tough treatment and what not from the guys and I told him, you know, "You have to tell me about it," you know. I mean, in other words, "For me to give you any help." And he told me that he did in fact kill her.

(Appendix E, R.T. of Dec. 11, 1985, p. 17-18.) The court found that Sarivola's implied promise to protect Fulminante rendered Fulminante's confession involuntary.

It is clear that the Arizona Supreme Court did not apply the correct legal test in determining that Fulminante's confession was involuntary. The court,

in essence, found that "but-for" Sarivola's promise of protection Fulminante would not have confessed. When the correct test, the totality of circumstances test, is applied to the facts of this case, it is obvious that Fulminante's will was not overborne by Sarivola's implied promise of protection.

There is nothing in Fulminante's character traits or background to suggest that he is a man whose will could be easily overborne. At the time he confessed to murdering his step daughter, Fulminante was on intimate terms with the criminal justice system. At the age of 42, he had six felony convictions and four misdemeanor convictions. Although he had dropped out of school during the fourth grade, he was of average or low average intelligence.

There is nothing in the circumstances of the interrogation to support a finding that Fulminante's will was overborne by Sarivola's implied promise of protection. The two men were both prison inmates who were on friendly terms. They had discussed the death of Fulminante's step daughter a number of times before, and the conversation in which Fulminante confessed occurred while the two men were taking an evening stroll around the prison track. Fulminante's admissions were not the end result of any lengthy interrogation by Sarivola. Although Fulminante's confession was made after Sarivola told Fulminante that he would not be in a position to protect him from other inmates unless Fulminante told him the truth, there is no indication that Sarivola's implied promise of protection induced Fulminante to confess. Even though other inmates were giving

Fulminante a rough time in prison, he had never complained to Sarivola, he had never expressed any fear of the other inmates, and he did not ask for any help or protection from Sarivola either before or after his confession. Fulminante would have known that Sarivola was due to be released from prison in November of 1983, approximately 6 months prior to Fulminante's scheduled release in May of 1984. However, the only concern Fulminante expressed to Sarivola was his concern that the Mesa law enforcement officials would continue in their efforts to connect him with Jeneane's death after his release from Raybrook. As Sarivola stated it:

> . . . He always said that they were too fucking stupid to get him, that they never knew where to look, and -- but he did say that they were constantly applying pressure and he was very, very worried it would be waiting for him when he got out of Raybrook.

(Appendix E, at 22.)

There was no especially egregious conduct by law enforcement officials in this case. There was an element of trickery and deception by the inmate informant. Sarivola gained Fulminante's confidence by being friendly with him. Sarivola did not threaten Fulminante, nor did he subject him to any mistreatment. Had Fulminante known that Sarivola was an F.B.I. informant, it is doubtful that he would have confided in him. However, the fact that Fulminante was ignorant of Sarivola's true purpose in questioning him about Jeneane's death does not render Fulminante's confession involuntary. Despite the fact Sarivola made an implied promise to protect Fulminante, it is apparent that Fulminante's will was not overborne by that promise. It is evident that Fulminante relished the opportunity to talk to another person about the details of the torture-murder of his

step-daughter. That he enjoyed talking about it is further evidenced by the admissions he later made to Donna.

This Court noted in Miller v. Fenton, 474 U.S. 104, 110 (1985), that:

> Without exception, the Court's confession cases hold that the ultimate issue of "voluntariness" is a legal question requiring independent federal determination.

In the present case, the Arizona Supreme Court erroneously overruled the trial court's determination of voluntariness. The state requests this Court to grant certiorari in order to correct that error.

After initially affirming Fulminante's murder conviction on the ground that admission of his involuntary[1] confession was harmless error beyond a reasonable doubt, the Arizona Supreme

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1. The state does not concede that Fulminante's confession to Sarivola was involuntary.

Court reversed his conviction in its supplemental opinion, stating that:

> It is clear that federal constitutional law, as interpreted, pronounced, and applied by the United States Supreme Court and other federal courts compels us to conclude that the receipt of the original coerced confession may not be considered harmless error.

The court relied on this Court's opinions in Mincey v. Arizona, 437 U.S. 385, 319 (1978); Chapman v. California, 386 U.S. 18, 23 n.8 (1967); Jackson v. Denno, 378 U.S. 368, 376 (1964), and Payne v. Arkansas, 356 U.S. 560, 568 (1958), in support of its conclusion.

In requesting this Court to reverse the Arizona Supreme Court's opinion in this case, the state recognizes that there is substantial authority to support the position that the court took. However, none of this Court's opinions relied upon by the Arizona Supreme Court squarely addressed the question whether admission

of an involuntary confession is subject to a harmless error analysis in a case where there is overwhelming evidence of guilt.

The Arizona Supreme Court stated that this Court has made it clear that introduction of an involuntary confession is not subject to a harmless error analysis. In Milton v. Wainwright, 407 U.S. 371 (1972), however, this Court conducted a harmless error analysis in a case where a habeas petitioner claimed that his confession was both involuntary, and that it was obtained in violation of his Sixth Amendment rights.

Based upon this Court's opinion in Milton v. Wainwright, the following circuit courts and state courts have applied a harmless error analysis in cases involving allegedly involuntary confessions: United States v. Carter, 804 F.2d 487 (8th Cir. 1986); United

States v. Murphy, 763 F.2d 202 (6th Cir. 1985), cert. denied, Stauffer v. U.S., 474 U.S. 1063 (1986); Harrison v. Owen, 682 F.2d 138 (7th Cir. 1982); State v. Childs, 430 N.W.2d 353 (Wis. App. 1988); State v. Dean, 363 S.E.2d 467 (W.Va. 1987); Hinshaw v. State, 398 So. 2d 762 (Ala. 1981). See also, Meade v. Cox, 438 F.2d 323 (4th Cir. 1971); United States ex rel. Moore v. Follette, 425 F.2d 925 (2d Cir.), cert. denied, 398 U.S. 966 (1970); People v. Ferkins, 116 A.D.2d 760, 497 N.Y.S.2d 159 (1986); State v Castaneda, 150 Ariz. 382, 724 P.2d 1 (1986); Kelley v State, 470 N.E.2d 1322 (Ind. 1984); State v. Johnson, 35 Wash. App. 380, 666 P.2d 950 (1983); People v. Gibson, 109 Ill. App. 3d 316, 440 N.E.2d 339 (1982).

The Arizona Supreme Court refused to acknowledge that there is now a substantial body of case law that stands

for the proposition that the erroneous admission of a coerced confession does not automatically require reversal.

In Rose v. Clark, this Court stated that:

> We have emphasized, however, that while there are some errors to which Chapman does not apply, they are the exception and not the rule. Accordingly, if the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other errors that may have occurred are subject to harmless error analysis.

478 U.S. 570, 578-79 (1986) (citations omitted) (emphasis added).

Clearly, the admission at trial of Fulminante's coerced confession was not a constitutional violation insulated from a harmless error analysis under the theory that it tainted the entire trial proceeding. It was the type of evidentiary error that readily lends itself to a harmless error analysis. As this Court stated in Holloway v. Arkansas,

435 U.S. 475, 490-91 (1978):

> In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury.

(Citations omitted.)

In its original opinion, the Arizona Supreme Court had no problem in determining that admission of Fulminante's coerced confession was harmless beyond a reasonable doubt under Chapman, where a second valid confession, corroborated by other evidence, provided overwhelming evidence of his guilt. It is apparent that the error in admitting a coerced confession does not, in all circumstances, taint the entire criminal proceeding. Concededly, there may be cases in which the reviewing court is unable to determine whether such error is harmless beyond a

reasonable doubt. That does not mean that it is improper to apply a harmless error analysis in a case involving a coerced confession.

CONCLUSION

This case merits this Court's attention. The Arizona Supreme Court erroneously overruled the trial court's determination that Fulminante's confession was voluntary. In doing so, the Arizona Supreme Court failed to apply the totality of the circumstances test in addressing the issue of voluntariness. When Fulminante's confession is analyzed under that test, it is apparent that Fulminante's will was not overborne by Sarivola's promise of protection.

Even assuming, arguendo, that the Arizona Supreme Court was correct in determining that Fulminante's confession was involuntary, it erred in finding that it was precluded by this Court's prior

decisions from subjecting Fulminante's involuntary confession to a harmless error analysis, where there was overwhelming evidence of his guilt, including a second valid confession.

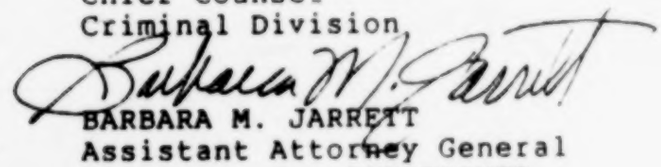
The state requests this Court to grant review in this case in order to address the question whether a conviction can ever be allowed to stand where an involuntary confession has been admitted in evidence. Obviously, there is a split in authority on that issue. This Court should grant review in this case to resolve the issue once and for all.

DATED this 17th day of November, 1989.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division



BARBARA M. JARRETT
Assistant Attorney General
Attorneys for PETITIONER

AFFIDAVIT

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

BARBARA M. JARRETT, a member of the Bar of this Court, being duly sworn upon oath, deposes and says:

That she served three (3) copies of the Petition for Writ of Certiorari upon Dean W. Trebesch and Stephen R. Collins, Maricopa County Public Defender's Office, Attorneys for Oreste C. Fulminante, by depositing the same in the United States Mail, with first class postage prepaid.

Additionally, as a courtesy, she herewith certifies that service of three copies of this petition has been made upon the United States of America by depositing the same in the United States Mail, with first class postage prepaid, addressed to the Solicitor General, Department of Justice, Washington, D.C., 20530.

DATED this 17th day of November, 1989.

Barbara M. Jarrett

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SUBSCRIBED AND SWORN to before me this 17th day of November, 1989.

Carita M. Hughes

Carita M. Hughes
NOTARY PUBLIC

My Commission Expires:

January 4, 1992

CRM86-0370/1467D/ch